

Hardeo Gujar Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-05-1988

Reported in : 1988(2)WLN75

Judge : Dinker Lal Mehta, J.

Appeal No. : S.B. Criminal (Jail) Appeal No. 101 of 1988

Appellant : Hardeo Gujar

Respondent : State of Rajasthan

Disposition : Appeal dismissed

Judgement :

Dinker Lal Mehta, J.

1. This appeal is directed against the judgment dated 27th January 1988, passed by the learned Sessions Judge, Ajmer, in Sessions Case No. 25/86. Learned Sessions Judge convicted and sentenced the present appellant under the Narcotic Drugs and Psychotropics Substance Act, 1985, to 10 years rigorous imprisonment and a fine of Rs. 1,00,000/-. In case of default in payment of fine, accused appellant was further directed to undergo rigorous imprisonment for one year.

2. Prosecution story unfolded during the trial is that on 26th November, 1985 at about 4 A.M., ASI Bajrang Lal. Police Station Pushkar. accompanied by Constable

Prem Singh and Mool Dan, left for patrolling duty in the Pushkar fair. While the two officials were having their Patrolling round, they were informed by an informant that one Hazari Gujar resident of Pagara who used to traffic in opium had brought opium and was around the Gujaron-ka-deora near the Brahmaji temple. On receiving this information all the three Police officials reached Gujaron-ka-Deora. There they found a man sitting on the Chabutra outside the Deora. The man had a bag in his hand. On search being taken of the bag, a packet of plastic paper containing opium was found in the bag. The opium recovered weighed 350 gms. in weight. Accused was asked as to whether he had any licence or permit for the possession of the drug to which he answered in negative, sample weighing 30 gms. was taken out of the substance recovered and was sealed in a separate packet. Rest of the recovered material was sealed in a separate packet. The accused was placed under arrest and was taken to the Police Station, Dara Pushkar, where the written report Ex. P. 3 was lodged by the ASI Bajrang Lal, where upon the FIR Ex. P. 4 was recorded. Accused was charged under Section 8/18 of the Act of 1985. Accused pleaded not guilty and claimed to be tried. During the trial the evidence of the prosecution and defence witnesses was recorded. Learned Sessions Judge found the accused guilty and convicted and sentenced him as referred above.

3. Learned counsel for the appellant has assailed the judgment of the court below on number of grounds. First of all, he submitted that the case is squarely covered by the judgment of this Court. He has cited before me the case of Nand Lal v. State of Rajasthan 1987 RCC 435 decided on 5-10-1987. My brother Hon'ble Justice Dave while dealing with the provisions of Section 42 of the Act of 1985, held as under:

Powers of investigation particularly detention, search, arrest and seizure are given to the officers of the rank of Sub-Inspectors and above the Sub-Inspectors and to the Deptt. Central Excise, Customs, Revenue Intelligence, and Central Economic Bureau.

Investigation without authority of law-Effect-Amanulla Khan PW 1 who was only Head Constable was not authorised under the Act to search or get the accused in

custody-Held, a Head Constable is also a constable and is certainly not a Sub-Inspector or Inspector of Police. He had no jurisdiction express or implied under the Act to exercise the powers under Section 42 and as such the very foundation of the case is without proper authority of law.

4. Learned counsel for the appellant has also cited before me the case of *Umrav v. State of Rajasthan* 1988 RCC 133. My brother Hon'ble Mr. Justice Farooq Hasan has held as under:

Section 42. Whether Police Officers-SHO or of the rank of Inspector had no jurisdiction or authority to make search, seizure in absence of specific notification under the Act and the trial and conviction of the accused is thus vitiated-Held, yes.

The State Government issued notification in exercise of powers under Section 42 of the Act authorising all Inspectors or S.I. of Police to exercise power under the Section on 16-10-1986 while the SHO P.S. Khandela searched and seized and arrested accused on 1-8-1986 without any such authority conferred by any special notification. Thus, the search was made by a police constable without jurisdiction and investigation was also made by an officer not empowered to do so. And, as such very foundation of the case is without authority of law, The trial is vitiated.

5. The contention of the learned Counsel for the accused-appellant is that the ASI was not authorised to search and arrest the accused, as such, the whole trial is vitiated and the investigation and trial is without jurisdiction.

6. The second limb of the argument of the learned Counsel for the appellant is that the witnesses are the officials of the police Department and no independent witness has been examined. He submits that this is a case in which the presence of independent witness is necessary.

7. Learned Counsel for the appellant has also cited before me the case of *Ratan Lal v. State* 1987 (2) Crimes 29 in which his Lordships of the Delhi High Court held as under:

Looking at all these facts in their totality, I have no hesitation in remarking that in this case the public witnesses have deliberately not been associated; the sample

has deliberately not been got sealed with the seal of the SHO. The Court knows that at the time of seizure it was sealed with the seal of PW 7 and PW 4. The expert has stated that when the sample came to him, it bore only one seal even the report regarding the particulars of seizure and arrest Under Section 57 NDPS Act has not been sent to the Superior Officer. All these facts taken together have rendered the prosecution a suspect and the least that can be said is that the prosecution case is not free from doubt. In the circumstances of this case, it is very unsafe to act on the uncorroborated testimony of all the three police officials. The appeal is allowed and the conviction and sentence of the appellant are set aside. The appellant is acquitted.

8. Learned counsel for the appellant has also referred the case of this Court, *Hunuman v. State of Rajasthan* 1987 Cr. LR 804, in which the Hon'ble Mr. Justice K.S. Lodha has held as under:

The prosecution story as put forward by the prosecution does not appear as true and trust-worthy. Two things clearly stare in the eye when the prosecution evidence is looked into. The one is that although the occurrence is said to have taken place on 28-2-1986 at 7 p.m. and the First Information Report was lodged on that very day at 9 p.m. by the SHO Baney Dan himself, the copy of the First Information reached the Court as late as on 3-3-1987. The other is that even though independent witnesses could have been called but no effort has been made by the SHO to obtain the same.

The possibility of some change in the prosecution story having been introduced during the delay between 1-3-86 & 3-3-86, therefore, cannot be ruled out. It may also be added that the evidence of the three police witnesses regarding the time of the recovery is also a little discrepant, in as much as PW 2, Kishore Singh says that it was just little dark when the accused was caught, where as, Utama Ram, PW 3 states that it was pitch dark Ordinarily such a discrepancy would not be of much consequence but when there are other doubtful circumstances and the case is one which involves a penalty of 10 years' and a fine of Rs. 1 lac, it is the duty of the prosecution to establish the case beyond any reasonable doubt and leave no lurking suspicion in the mind of the Court. Thus, the discrepancies in the evidence

of these Police Officers cannot be lightly brushed aside.

9. The third limb of the arguments of the learned Counsel for the appellant is that the seal which was placed on the sample was not the seal of the present Station House Officer, but it is the seal of the retired officer. He submits that the presumption about the correctness of the seal cannot be drawn in the facts and circumstances of the case.

10. On the other hand, learned Public Prosecutor submitted that Section 42 of the Act of 1985 does not apply in the instant case. He has invited my attention to the provisions of Section 43 of the Act and submitted that Section 43 of the Act applies to the present case. It was also submitted by the learned Public Prosecutor that even if it is assumed though, not admitted that Section 42 applies even then the trial is not vitiated. Learned Public Prosecutor has cited before me the cases of A.C. Sharma v. Delhi Administration : 1973 CriLJ902 ; H.N. Rishbud v. State of Delhi : 1955 CriLJ526 ; Mst. Pyari v. State 1962 RLW 598 and the case of Khandu Sonu Dhoru v. State of Maharashtra : 1972 CriLJ593 . Learned Public Prosecutor also supported the judgment of the court below. She submitted that if the Court finds that they are trustworthy witnesses there should be no reason to dis-believe them. It was submitted by the learned Public Prosecutor that the quality of the witness counts and not the number and nature of the witnesses.

11. Learned Public Prosecutor also submitted that the sealed packets were sent to the Chemical Examiner and they were found in tact. Learned Public Prosecutor further submits that the provisions of Section 114 of the Evidence Act should be applied and there is a general presumption that any act done by the Public Officer in the discharge of his duty is done faithfully and the presumption should be drawn that the Act has been done faithfully unless otherwise suggested by direct evidence or by implication.

12 Learned counsel for the appellant, in reply, has cited the case of Neel Ratan v. Laxmi Narain : 1965 CriLJ100 ; and Delhi Administration v. Ram Singh : [1962]2SCR694 .

13. I have heard the rival contentions of both the parties. I will deal one by one with the points raised by the learned Counsel for the parties.

14. Sections 42 and 43 of the Act of 1985 read as under:

Section 42 Power of entry, search, seizure and arrest without warrant or authorisation-(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of Central excise, narcotics, customs, revenue intelligence or any other department the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset:

[a] enter-into and search any such building, conveyance or place;

[b] in case of resistance, break open any door and remove any obstacle to such entry;

[c] seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter-IV relating to such drug or substances; and

[d] detain and search, and, if he thinks proper, arrest a person whom he has reason to believe to have committed any offence punishable under Chapter-IV relating to such drug or substances; Provided that if such officer has reason to

believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief;

2....

Section 43 Power of seizure and arrest in public places-Any officer of any of the departments mentioned in Section 42 may:

(a) seize, in any public place or in transit any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter-IV has been committed, and along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter-IV relating to such drug or substance;

(b) detain and search any person who he has reason to believe to have committed an offence punishable under Chapter-IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

15. Under Section 42 'any such officer' of the 'department' referred to in Section 42, if he has reason to believe from Personal knowledge or information given by any person and taken down in writing that any narcotic or drug or psychotropic substance in respect of which offence under Chapter IV has been committed or any document or other article which may furnish v. evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may between sun-rise and sun-set perform such act which has been enumerated in clauses (a), (b), (c) and (d) Section 42 of the Act of 1985 Learned Public Prosecutor has pointed out that Under Section 42 the words 'any such officer' are very relevant. It was submitted by the learned Public Prosecutor that the officers who are empowered in his behalf by the Central Government or the State Government fall within the category of 'any such office'.

16. It was pointed out by the learned Public Prosecutor that Section 42 of the Act comes into play only when any offence has been committed or any document or other article which may furnish evidence is kept or concealed in any building, conveyance and enclosed place. Learned Public Prosecutor-submits that if it is not kept in building, conveyance or enclosed place but if it is placed on a public open place, Section 42 is not attracted. Learned Public Prosecutor has also referred Section 43 and submitted the under Section 43 the words 'any officer' of any of the department mentioned in Section 42 has been used. The word 'such' as used in Section 42 has not been used in Section 43 and it is not necessary according to the learned Public Prosecutor, to issue any notification empowering any of the officers of the Department referred in Section 42. It was also pointed out that Section 43 applies only when the articles seized are in any public place or in transit. Learned Public Prosecutor submits that the scope of Section 42 and Section 43 is different and Section 43 is independent of Section 42. Learned counsel for the appellant submits that there is a punishment of 10 years and a fine of Rs. 1 lac and as, such, the Legislature in its wisdom has provided that such officers should be empowered by the State or the Central Government. He submits that no distinction can be drawn as suggested by the learned Public Prosecutor.

17. I have heard both the parties at length. My brother Hon'ble Mr. Justice Dave while dealing with the case of Nand Lal v. state(supra), has not taken into consideration the provision of Section 43 of the Act In that case, opium was found from a person who was travelling in a train. Train may rare cases fall within the purview of the word 'conveyance' as used in Section 42 of the Act. I am of the view that running train may also fall within the purview of public place and also within the purview of transit Provision of Section 43 might not have been brought to his notice as such it has not been referred at all. As far as the case of Umrav v. State of Rajasthan(Supra) is concerned, the Police Officers went to the village Khandela to raid at Umrav,s house. Umrav tried to run away, but he was caught and the articles which were found on his person were seized when Umrav was in the house In this case also the submissions made by the Public Prosecutor have not been discussed. Only a reference of Section 43 has been made in para 10 of the judgement and nothing has been discussed about the scope and applicability of

Sections 42 and 43 in both the judgments. Thus, there is no decision of this Court on the point argued by the learned Public Prosecutor.

18. Legislature enacts law with the intention that it will be applied in a way which will serve the cause for which the legislation has been enacted. The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The Opium Act, 1857 and 1878 were amended from time to time, but it was found that the intention of the Legislature to cure the disease of drug addicts could not be achieved. With the passage of time and development in the field of drug addicts and drug abuse at national and inter-national level, many deficiencies in the existing laws have come to the notice of the Legislatures, Courts and the Investigating Agencies. For the purpose of getting rid of the deficiencies and to consolidate and amend the law relating to Narcotic drugs, to make stringent provisions for the control and regulations for operations of the Narcotics Drugs and psychotropic substance and the matter connected therewith, the Act of 1985 has been enacted.

19. Their Lordship's of the Supreme Court in the case of Mubarak Ali v. State 0043/1957 : 1957 CriLJ1346 have pointed out the law relating to the interpretation of the Statute. The construction must be based on the meaning of the words used, to be gathered according to the ordinary rule of interpretation and in consonance with the generally accepted principles of exercise of criminal jurisdiction.' One of the important accepted principle of the law of interpretation is that it should be presumed that every word used by the Legislature has been used for a specific purpose. Crimes committed by the white collar offenders generally go undetected. It is very difficult to establish a crime against the white collar offender. The menace of the white collar offenders is faced by the society and the laws like the Anti Corruption Act, the Prevention of food Adulteration Act and all laws relating to the economic offences could not be applied and implemented properly. The legislature had to amend the law from time to time to make it more stringent. There may be a defect in the drafting investigation, prosecution or even in the matter of applying. But, it is true that the laws which were enacted for the benefit of the society could not be applied and implemented in its true sense. It is also said that the big guns generally escape the liability and only for the purpose of conviction and recovery

the persons of the lowest ladder are arrested and cases are registered against them. It may be true to a great extent. The Courts are sitting for the purpose of achieving the goals laid down in the pre-amble of the Constitution. Any beneficial legislation, any legislation enacted by the Parliament for the welfare of the Society like the present Act of 1985 should be applied in a way which will serve the cause for which the Legislature has enacted the law. In the case of Mubarak Ali (supra), their Lordships have held that 'it is not necessary and indeed not permissible to construe the I.P.C. at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have very considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.' Thus, it is for the Court to see the modern needs of the society and the law should be applied looking to the needs. The judges should not be of the wavering mind. They should apply the law considering the necessity of the modern society. The necessity of the modern society is how to assist the Investigating Agency, the Prosecuting Agency in putting a check on the illicit drug traffic, within reasonable limits and to see that innocent person do not suffer. The doctrine of benefit of doubt cannot be and should not be stretched to that extent which will deprive the society of its just cause. I am aware of the fact that some times the Investigating Agency may be unfair and the possibility of implicating the false persons cannot be ruled out. It is the duty of the Court and particularly of the Judges to be equitable in the matter of applying the law.

20. With this approach in mind I am interpreting Sections 42 and 43 of the Act of 1985. The words 'buildings, conveyance and enclosed place' as used in Section 42 have been used for the specific purpose of protecting the persons who are living in the buildings, conveyance and enclosed place. The Legislature in its wisdom considered proper to draw a demarcating line between building, conveyance and enclosed place on one side and public place or place of transit on the other side. If the family is residing in a building or in a conveyance and a search is taken by junior most officer, the possibility of harrassment cannot be ruled out. So, for the purpose of Section 42 the Legislature considered it proper

that 'any such officer' who has been empowered by the general or special order by the Central or the State Government can take the search of the building, conveyance or enclosed place. The words have been specifically mentioned to show the demarcating line between the two otherwise, the legislature could have used any place instead of narrating the words, building, conveyance or enclosed or open place. Even a private open place does not fall within the purview of Section 42 unless it is enclosed. The legislature has used the words, 'enclosed open place, may be public or private. So, this demarcating line will have to be kept in mind. So, under Section 43 of the Act of 1985, the words used are public place or transit. So, naturally in a public place or a place of transit there cannot be harassment to the extent which can be done at the private residential building or a private conveyance or a private enclosed place.

21. For the reasons mentioned above, I am of the view that Sections 42 and 43 are independent of each other and, as far as the public place is concerned Section 43 is applicable and Section 42 is having no relevance at all. In the instant case, it is alleged that Bajrang Lal, ASI, took the search on the road which is a public place. In such circumstances, Section 43 will be applied in the instant case. The authorities cited by the learned Counsel for the appellant are not applicable in the instant case. Bajrang Lal was competent to take search in exercise of the powers conferred under Section 43 of the Act of 1985 and no case of illegality has been made out by the appellant. The citations referred by the appellant have been discussed by me earlier and they do not apply in the facts and circumstances of this case for the reasons mentioned above.

22. Assuming for the time being though not necessary to discuss but in the interest of justice, I consider it proper to discuss the second limb of the argument of the learned Public Prosecutor that no person can be acquitted on account of illegality in the matter of investigation.

23. Section 43 of the Code of Criminal Procedure provides that any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so

arrested to a police officer, or in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station. Thus, the law provides that the private person can arrest a person if the person commits an offence in his presence. The offence should be the non-bailable and cognizable. Section 465 Cr. P.C. (Old Section 537), reads as under:

Section 465(1) Subject to the provisions here-in-before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any section for the prosecution, unless in the opinion of that Court, failure of justice has in fact been occasioned thereby;

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

24. No finding, sentence or order passed by a competent Court shall be reversed or altered by the Court of appeal confirmation or revision on account of any error referred to in Section 465, Cr. P.C.

25. Learned Public Prosecutor has cited before me the case of A.C. Sharma v. Delhi Administration (supra), in which their Lordships have held as under:

The setting up of Delhi Special Police Establishment by the Central Government under the D.S.P.E. Act does not by itself deprive the anticorruption branch (Delhi Administration) of its jurisdiction to investigate the offence of bribery and corruption against the Central Government employees in Delhi.

Any irregularity or even illegality committed in the course of investigation does not by itself affect the legality of the trial by an otherwise competent Court unless

miscarriage of justice has been caused thereby.

26. Their Lordships of the Supreme Court held in this case that any irregularity or even illegality committed in the course of investigation does not by itself affect the legality of the trial unless miscarriage of justice has been caused there by. There may be circumstances by which the miscarriage of justice may be inferred. It is not necessary to prove the miscarriage of justice. It is sufficient if the probability of miscarriage of justice is shown by the person who wants to be acquitted on account of illegality in the course of investigation.

27. In the case of H.N. Rishbud's (supra), their Lordships held as under:

A defect or illegality in investigation, however, serious, has no direct bearing on the competence or the procedure relating to Cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190, Cr. P.C., as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Criminal Procedure Code is one out of a group of sections under the heading 'conditions requisite for initiation of proceedings'. The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., Sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance there with. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is, therefore, a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537, Criminal Procedure Code is attracted

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have been brought about miscarriage of justice. That an illegality committed in the course of investigation does not affect the

competence and the jurisdiction of the Court for trial is well settled.

Hence, where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused there by.

When a breach of the mandatory provisions of Section 5A, Prevention of Corruption Act is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of Section 5A of the Act.

28. In the case of *Mst. Pyari v. State* 1962 RLW 598, it has been held as under:

Accused failing to object to competency of person to investigate or that search was made by unauthorised Police Officer-Conviction not set aside as there was no miscarriage of justice.

29. In the case of *Khandu Sonu Dhobi (supra)*, it has been held as under:

Where the trial of the case has proceeded to termination, the invalidity of the preceding investigation would not vitiate the conviction of the accused as a result of the trial unless the illegality in the investigation has caused prejudice to the accused. AIR 1955 SC 196.

It is well established that where cognizance of a case has, in fact, been taken by the Court on a police report following investigation conducted in breach of provision of Section 5A the result of the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. The underlying reason for the above dictum is that an illegality committed in the course of investigation does not affect the competence and jurisdiction of the Court to try the accused.

30. On the other hand, learned Counsel for the appellant, has cited before me the case of *Nilratan Sircar v. Lakshmi Narayan Ram Niwas (supra)*, in which their

Lordships have held as under:

Section 5 of the Code of Cr. P.C. provides that all offences under any law other than the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the Code of Criminal Procedure, but subject to any enactment for the time being in force regulating the manner or place or investigating, inquiring into, trying or otherwise dealing with such offences. The foreign Exchange Regulation Act is a Special Act and it provides under Section 19-A for the necessary investigation into the alleged suspected commission of an offence under the Act, by the Director of Enforcement. The provisions of the Code of Criminal Procedure therefore, will not apply to such investigation by him.

31. This case cited by the learned Counsel for the appellant does not apply in the facts and circumstances of the case. Section 5 of the Cr. P.C. and the provisions of the Foreign Exchange Regulation Act, which is the Special Act, were considered by their Lordships. In this case the objection was raised at the initial stage of the trial. The applicability of the provisions of Section 19-A was discussed and the objection was upheld. This case does not apply in the facts and circumstances of this case as the objection was not raised at the initial stage and the case ended by way of conviction.

32. Learned counsel for the appellant has also cited before me the case of *Delhi Administration v. Ram Singh* (supra). This case also does not apply in the facts and circumstances of this case as the point was raised at the initial stage of the trial and before the completion of the trial. In the instant case, the trial has come to an end resulting in the conviction of the present appellant. Para 11 of the judgment in the case of *Khandu Sonu* (supra) is relevant. In this case, their Lordships of the Supreme Court have held that, it is well established that where cognizance of a case has, in fact, been taken by the Court on a police report following investigation conducted in breach of provisions of Section 5-A the result of the trial cannot be set aside. Thus, in this case also the cognizance has been taken, accused has been acquitted, but the matter of investigation will not come in the way unless it has been shown that illegality has caused mis-carriage of justice. Though, it was

not necessary to discuss this point, but it has been discussed because, it has been raised in the court by the learned Public Prosecutor. Learned counsel for the appellant has not suggested anything to show that mis-carriage of justice has taken place on account of illegality, if any, in investigation.

33. For the reasons mentioned above, I am of the view that even if we take that the provision of Section 42 of the Act of 1985 applies even then it is necessary to show that the conviction has resulted in the mis-carriage of justice for the purpose of setting aside acquittal.

34. Now, I will take the case on merits as argued by the learned Counsel for the parties. In the instant case, accused admits this position that he was arrested at about 4 a.m. on 26-11-1987 near Gujaron-ka-Deora. The case of the defence is that he was inside the Deora he was called and, thereafter, he was arrested. In reply to the question, the accused has stated that, [^]eq>s M;ksMs ds vUnj Is cqyk dj fxjrkj fd;k -^^ A pointed question was put to the counsel for the accused-appellant, whether the accused was known to the police party prior to the occurrence or not. Learned counsel for the appellant submits that there is nothing on record to show that the accused was known to the police party prior to the date of occurrence. The second important point for consideration is what is the cause of arrest and why the accused was picked-up. The accused does not say or even suggest that he was known to any officers of the Police Department or he was having enmity with any person. In such circumstances, the cause of wrongly implicating the accused is also not available on record. This does not mean that burden shifts on the defence. However, these two points are relevant for the purpose of appreciating the evidence produced by the prosecution. Accused was arrested vide Ex. P 2 in the presence of Mandas and Prem Singh Constables. Arrest memo Ex. P 2 and seizure memo Ex. P1 have been prepared. Seizure memo bears the specimen seal affixed on the packets. In the seizure memo it has been mentioned that 350 Gms. of opium was recovered and two packets were prepared. The written report was lodged by Bajrang Lal, ASI. (PW 1) at the Police Station at 1.30 p.m. The time of the incident is at about 1 p.m. Ex. P 5 is the entry of Rojnamacha showing that Bajrang Lal and other persons left for the purpose of patrolling. (PW 1) Bajrang Lal, ASI, has stated that he arrested the accused,

seized the opium, prepared two packets of opium and sealed them. He further states that he produced the packets at the Police Station and lodged the written report immediately. He admits that Mandas was present at the time of arrest of the accused. He further admits that the seal was placed on the packets and the words 'RLV' were written on the seal. The seal was of Roshan Lal Verma, who was Sub-Inspector at the Police Station prior to his retirement. He says that he took the seal of Mr. Verma and used to affix it.

35. PW 3 Prem Singh, accompanied Bajrang Lal and he has also narrated the same story which has been narrated by Bajrang Lal. He also obtained the packets from Malkhana and delivered them to the Chemical Examiner, Jaipur, and obtained the receipt Ex. P 6. He admits that one witness was present, but he was not in a position to say that he was Mandas. He admits that number of persons were there in the fair.

36. On behalf of the defence, two witnesses have been produced, namely, DW 1, Dhula and PW 2, Mangu. DW1 Dhula has stated that Hardev, Mangu and 50 to 60 persons were sitting on the Deora. Hardev was called by the Police and the Police took him to the Police Station. He states that he cannot name any person except Hardev accused and Mangu DW 2, Mangu has also appeared in the witness box and he states that accused was in the Deora, police called him and took him to the Police Station. Both the witnesses state that the accused had no article with him. It is an admitted position that the accused was not known to the Investigating Agency prior to the occurrence. There was no enmity or possibility of implicating the accused falsely by calling from Deora is ruled out.

37. Learned counsel for the appellant has also cited before me the case reported in 1987 (2) Crimes 29. In that case it was held that the public has deliberately not associated and deliberately the seal of the S.H.O. has not been affixed on the packets. It is not the case of the present accused. In the present case, the public man has been associated. Mandas was summoned and learned Public Prosecutor submitted that he does not want to examine him, thereby meaning that the Investigating Agency was not unfair to the prosecution. The witness was associated he was summoned in the court, but he has not been examined. As the

Public Prosecutor did not consider it proper to examine him the Investigating Agency or the Police Officer cannot be blamed. For this reason, this case does not apply. Even otherwise, with due respect to my brother Judge of the Delhi High Court I am of the view that the testimony of the Police Officers cannot be discarded or disbelieved only on the ground that they are Police Officers. While examining the testimony one should take note of it and there should be a cautious approach in the matter of appreciation. If one finds that the testimony of Police Officer is trust-worthy and there is no reason to discard the testimony only on the ground that he is a Police Officer testimony should not be discarded. Apart from that there is no reason to disbelieve the testimony in this case, the accused was not known to them and there was no enmity between them. The First Information Report was lodged within half an hour of the incident. Sample was sent to the Chemical Examiner and deposited immediately at the Police Station. These are the facts which compel me to come to the conclusion that the learned Sessions Judge was justified in accepting the testimony of the Police Officers and coming to a finding that they are trustworthy.

38. For the reasons mentioned by the learned Sessions Judge and referred by me also above, I am of the view that there is no inherent weakness in the testimony of the Police Officers who have appeared before the Court and the evidence should not be discarded.

39. Learned counsel for the appellant has argued about the seal. The seal was found intact by the Chemical Examiner and there is a presumption in law under Section 114 of the Evidence Act that every officer discharges his duties faithfully unless the presumption is rebutted. What weightage should be given in the matter of rebuttal, is altogether different. In the instant case, PW 1, Bajrang Lal and PW 3, Prem Singh have stated that the packets were sealed. PW 2, Gurnam Singh, who was Head Constable at the relevant time, has submitted that the packets were produced by Bajrang Lal they were entered in Malkhana register, which is Ex. P.7 at item No. 95. They were delivered to Prem Singh on 9-12-1985 for taking them to the Chemical Examiner. Prem Singh delivered them to the Chemical Examiner and produced the receipt Ex. P. 6. Prem Singh has appeared in the witness box and he has also corroborated the same version and all of them have stated that

the seals were intact. Dinesh Kumar was the S.H.O. at the relevant time and he has drawn Ex. P.4 the FIR and stated that the sealed packets were produced before him. As far as the sealed packets are concerned, learned Counsel for the appellant has submitted that the seal should be that of the Sub-Inspector who was working at that time. Police Officers were called during the fair. The fact that Bajrang Lal affixed the seal which he obtained from Rameshwar Lal, will not vitiate the prosecution case. There is no suggestion or allegation that the seal was not found intact and other articles have been tampered with.

40. For the reasons mentioned above, I do not find any force in the submissions made by the learned Counsel for the appellant. The appeal is dismissed.

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